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Supreme Court, U.S.
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NO. 08-691

IN THE

SUPREME COURT OF THE UNITED STATES

CALVIN DAVID FOX,

Petitioner,

vs.

SECURITIES EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR CERTIORARI TO THE
U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES

1.) Where the enabling statute, which allows the NYSE to be a self regulating organization, the Securities Exchange Act of 1934 Section 19(d) (Title 15 Section 78s(d)(2) United States Code), specifically provides that Notice of Discipline must be received by an aggrieved person, who may then within thirty (30) days of filing and receipt seek review, may the New York Stock Exchange lawfully ignore the enabling statute and impose an interpretation of its rule 476(d) that an aggrieved person must file for review within twenty five (25) days from the inked date of its private postal meter and that receipt by the aggrieved person is not required?

2.) Where Congress' statement of intent that the foregoing Notice of Discipline requirement in Title 15 Section 78s(d)(2) is a "fundamental standard of due process," is the NYSE interpretation of its Rule 476(d) that only twenty five (25) days Notice of Discipline from the inked date of a NYSE private postal meter is necessary and that receipt is not required, shockingly unlawful and a denial of fundamental due process?

3.) Whether the Circuit Court of Appeals for the District of Columbia has misapplied this Court's opinions requiring, "deference to an agency's interpretation of its own regulations," where the New York Stock Exchange rule is shockingly unlawfully and unconstitutional in the face of the foregoing

Congressional intent that the Notice of discipline provisions in the enabling statute, Title 15 Section 78s(d)(2) United States Code, requiring receipt and thirty (30) days before review must be sought are "fundamental standards of due process" for any actions by the NYSE, a self-regulating organization.

4.) Whether the inked date of a private postal meter is proof of service by mailing by United States Certified Mail, where there is no round-dated receipt as required by Postal regulations; the NYSE failed to present the Certified mailing to the USPS and the U.S. Postal Service has no record nor evidence that it was in possession of the letter Notice prior to actual delivery?

5.) Whether the Court of Appeals allowing the inked date of private postal meter as proof of mailing, conflicts with federal Courts, State Court decisions and USPS regulations regarding postal meters, that private postal meters are neither proof of mailing nor receipt.

6.) Whether the Court of Appeals should have reversed the SEC opinion, which denied rehearing based upon the NYSE response, which was both ex parte and in submitted in violation of SEC Rule 470, which prohibits a response unless required by the Court.

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OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals, for the District of Columbia, dated March 26, 2008, is contained in the Appendix at A1-A2 and will be reported and widely cited in West's electronic case reporting system, as Fox v. SEC, 2008 West Law 1885426 (D.C. Cir. March 26, 2008).

JURISDICTION

On July 14, 2008 the U.S. D.C. Circuit denied rehearing and rehearing en banc. A11-A12. The Petitioner invokes the Court's jurisdiction under Title 28 United States Code Section 1254.

This Court has jurisdiction herein upon the plainly erroneous application of The Securities Exchange Act of 1934, Section 19(d), Title 15, Section 78s(d)(2); this Court's decisions and conflicts with other Courts, under Rule 17 of the Rules of the Supreme Court, Title 28 U.S. Code Section 1254(1) and Amendment V of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The due process clause, Amendment V of the United States Constitution, provides that:

"No person . . . shall be deprived of life, liberty, or property, without due process of law;"

The Securities Exchange Act of 1934 Section 19(d), Title 15 Section 78s(d)(2) provides inter alia, that:

> (2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine." [Emphasis added].

Legislative History, 1975 U.S. Cong.Admin.News 179, at 203, P.L. 94-29, provides Congress' intent that Section 19(d) provides the minimum fundamental due process required of self-regulating organizations:

> Recognizing that the self-regulatory organizations utilize governmental-type powers in carrying out their responsibilities under the Exchange Act highlights the fact that these organizations must be required to conform their activities to fundamental standards of due process."

NYSE Rule 476d provides that:

> Service shall be effective by [1] personal service of such Charge Memorandum, or [2] by leaving same either at the respondent's last place of residence as reflected in Exchange records, or [3] upon mailing same to the respondent at the aforesaid office address or place of residence." [Enumeration added].

Rule 503.3.3.5 entitled "Procedure" at (a) of the USPS Domestic Mail Manual (November 9, 2006) (DMM) provides that:

> **Procedure**
>
> A mailer of Certified Mail must:
>
> a. Enter on Form 3800 the name and complete address of the person or firm to whom the mail is addressed." [Emphasis added].

Rule 503.3.3.5 d (DMM) provides that:

> If a postmarked sender's receipt is requested, attach the Certified Mail sticker to the address side of the article and present the article and the completed receipt to the USPS employee, who then round-dates the receipt to show when the article was accepted." [Emphasis added].

Rule 604.4.1.1 DMM provides that:

> "Postage Meters; and PC Postage Products ("Postage Evidencing Systems")
>
> **4.1 Basic Information**
>
> **4.1.1 Definitions**
>
> Postage meters and PC Postage products are collectively identified as "postage evidencing systems." A postage evidencing system is a device or system of components a customer uses to print evidence that postage required for mailing has been paid.

Rule 470(b) of the SEC Rules of Practice specifically provides that when a motion for reconsideration is filed, "No response to a motion for reconsideration shall be filed unless requested by the Commission."

STATEMENT OF THE CASE

The facts recited herein are not in dispute. In August of 1999, the Petitioner, Calvin David Fox (hereinafter Fox) obtained a series 7 license as a Financial Advisor for the New York Stock Exchange (NYSE) and began working at Prudential Securities in Fort Lauderdale. Within a month Fox complained to his employer, that account practices of Prudential Securities amounted to money laundering. Fox repeated this complaint to federal and state officials.

On February 7, 2000, based upon one (1) fifteen minute conversation with a company attorney on January 11, 2000 about the effects of a Florida Rule of Appellate Procedure, Prudential fired Fox and tried to keep his clients and their assets. On the other hand, the participants in the money laundering scheme Fox had reported, were given jobs elsewhere in the securities industry and six figures each not to talk to anyone about it. Fox's complaint resulted in at least one federal investigation of Prudential by U.S. Customs.

Before 1934 the NYSE was an unregulated private club with no oversight. Silver v. NYSE, 373 U.S. 341, 350-351 (1963). Because of the financial debacle of 1929, the NYSE became a so-called, "self- regulating organization (SRO)" under the 1934 Securities Exchange Act, 73rd Cong. Ch. 404. In the face of the same financial debacle again in 2008, some critics would say the NYSE is still an unregulated, private gambling club with no effective oversight. See, e.g., Badway & Busch, "Ending Securities Industry Self-Regulation As We Know It," 57 Rutgers L.Rev. 1351.

In 1975 Congress created Section 19(d) [Title 15, Section 78s(d)] requiring receipt of Notices of discipline as "fundamental due process" for aggrieved persons disciplined by the NYSE. Legislative History of Securities Act of 1934 Amendments 179, at 203, P.L. 94-29 [creating Section 19(d)]. Therefore the NYSE created the fictitious division of the NYSE called "Hearing Panels," which shares the same office with a fictitious division of the NYSE called "Enforcement." Together they conduct all SRO disciplinary hearings required by Section 19(d). The Board of the NYSE reviews Enforcement's panel decisions upon the request of any aggrieved person under Section 19(d).

At a two (2) day hearing on May 21st and 22nd 2002, before Enforcement's first panel herein, as noted above, the former company attorney said he did not remember the conversation with Fox. However, Enforcement's panel did not exonerate Fox, but held him strictly liable for the mere possession of his "Mother's document." Fox contended that the Mother's document had nothing to do with trade upon the Exchanges. Upon review, the Board of the New York Stock Exchange (NYSE) issued a one line statement approving the first panel opinion recommendation of a four year suspension.

Relevant to this petition, on October 31, 2003 the Securities Exchange Commission (SEC) reversed the order of the NYSE and Enforcement's panel opinion for lack of sufficient evidence, because no evidence directly refuted Fox's exonerating testimony. A33-A41.

After remand, on April 7, 2005 a second panel opinion, where no evidence and no witnesses were heard, was also reviewed at the request of Fox and was both

affirmed and rejected as insufficient by the Board of the NYSE. Fox therefore filed a Notice of Appeal. A42. Rather than rule upon Fox's Notice of Appeal, the Secretary of the SEC just mailed it back to Fox.

Thereupon, a third panel was convened, which also heard no witnesses and took no evidence. Instead, on March 26, 2006, while trying to sustain the complaint against Fox, Enforcement's third panel falsified evidence, fabricated facts and again affirmed the NYSE claim against Fox. A43-A44. The letter Notice of the third panel opinion, dated March 31, 2006 and mailed by Enforcement, mistakenly provided that Fox had twenty five (25) days from the date of the letter Notice to seek review. Id. Fox received the letter Notice as required by Section 19(d) on April 6, 2008 through delivery by the U.S. Postal Service (USPS). A48, para. 6. The Notice appeared to be by Certified mailing and Fox signed a receipt. A48, para. 6. Twenty one (21) days later on April 27, 2006, Fox filed a demand for review upon the Acting Secretary of the Board of the NYSE. A48, para. 7.

Enforcement thereafter contended that under NYSE Rule 476(d), Fox's demand for review should be dismissed as untimely because it was filed twenty seven (27) days after March 31, 2006, the date of Enforcement's private postal meter inked upon the envelope, which the letter Notice of the third panel opinion, was received in. See, A47; A51. The Acting Secretary therefore dismissed Fox's demand for review as untimely claiming that the third panel opinion was "given" to Fox on March 31, 2006, the date inked by Enforcement's private postal meter and March 31, 2006 was more than twenty-five (25) days from the filing of Fox's demand for review. A9-A10.

On appeal to the SEC, Fox brought all three panel opinions and the two written decisions of the Board of the NYSE for review by the SEC. A52. He claimed inter alia, that this cause was the continuation of one process and that the dismissal was a denial of fundamental due process and equal protection and the time for filing should have been calculated from his receipt of the letter Notice, which was not properly mailed anyway.

In response to the claim that Fox had filed his demand for review more than twenty five days from the date inked on the envelope by Enforcement's private postal meter, the SEC issued its order requiring Enforcement to produce evidence that the March 31, 2006 letter Notice was served by Certified Mail on March 31, 2006 as alleged. A53-A54. In response to the SEC order, Enforcement produced an undated, blank "Certified Mail" receipt and one side of a return receipt, which was also undated. A55, para. 2. Enforcement claimed that the inked date of March 31, 2006 of Enforcement's private postal meter was evidence of mailing on March 31, 2006 and Fox's demand for review was filed twenty seven (27) days from March 31st, which is outside the twenty five (25) days allowed to seek review under NYSE Rules 476(d) and (e) . See, A51; A55, para. 3.

In response, Fox produced a USPS Report in which USPS stated it had no evidence of its possession of the March 31st letter Notice as mail until April 6, 2006, when it delivered the March 31st letter to Fox. A56, para. 5, A57. In sum, Enforcement never took the March 31st letter to USPS for mailing. Instead, sometime before April 6, 2006 someone tossed the letter Notice into mail pickup with the blank Certified mailing documents

appended to the envelope. There was therefore no evidence of mailing prior to April 6, 2006 when it was received by Fox. Id. Twenty one (21) days after receiving the Notice letter, under Section 19(d), Fox had filed his timely demand for review by the Board of the NYSE.

Notwithstanding Section 19(d) requiring receipt as "fundamental due process," the SEC dismissed Fox's appeal saying that he was bound by the NYSE interpretation of NYSE Rule 476(d) which allows "service" of Notice to be effective upon mailing and that Fox had to seek review under NYSE Rule 476(e) within twenty five (25) days. A3-A8. The SEC rejected Fox's contention that receipt of the letter Notice was required by "fundamental due process" and equal protection before any period to seek review commenced. A6. The SEC held that since Fox's demand for review to the Acting Secretary of the NYSE was untimely, he had failed to exhaust his administrative remedies. A6-A7.

Fox filed a vigorous Motion to Reconsider contending that Enforcement failed to produce competent evidence of either mailing by certified mail or that Enforcement's letter Notice was mailed, in that none of the documents was dated by the USPS and the USPS said it had no evidence that it had the letter Notice until April 6, 2006 when it was delivered to Fox; and that the inked mark of a private postal meter is evidence only that postage has been paid and is not evidence of mailing. A60-A65; A57-A58. Fox also contended again that "service" of the letter Notice, required receipt by Fox before any period for demanding review commenced. A60-A68.

Rattled by Fox's Motion for Reconsideration and without any request by SEC as required by SEC Rule of

Practice 470(b) (A70), and without providing Fox with a copy of its response (A71), Enforcement filed a lengthy response to Fox's motion. See, A72-A78 (received in the D.C. Circuit Court of Appeal). In its ex parte response Enforcement claimed that the postal meter inked mark dated March 31, 2006 was proof of mailing, reasoning that musta been what we done, because that's what we done before. A77, line 15. Therefore, in its opinion denying rehearing, the SEC specifically relied upon this ex parte and Rule violation communication by Enforcement to deny rehearing. A15, line 14.

On appeal to the U.S. Court of Appeal for the District of Columbia Circuit, which hears virtually all agency appeals, Fox vigorously contended inter alia, 1.) that service of the letter Notice required that Fox receive the letter Notice under Section 19(d) of the Securities Exchange Act of 1934 [Title 15 Section 78s(d)(2)] before any period for seeking review commenced; 2.) that receipt of Notice was consistent with NYSE Rule 476(d)'s other provisions requiring some measure of receipt; 3.) that Section 19(d) as the enabling statute for NYSE to act as a self-regulating organization (SRO) and overrode any NYSE Rule or interpretation to the contrary. A17; e.g., A25-A28. Fox also raised each ground he had presented to the SEC and the NYSE.

The Court of Appeals affirmed the dismissal by the SEC, citing cases in which the Court defers to Agency interpretation of Agency rules, in this cause: NYSE Rule 476(e) requiring twenty five days notice and the NYSE interpretation of Rule 476(d) allowing service to be complete without receipt. A1-A2. Fox filed lengthy motions for rehearing and rehearing en banc (A19-A32), which were denied. A11-A12.

REASONS TO GRANT THE PETITION

A. Importance to the Administration the Federal Statute and proper Constitutional interpretation.

The District of Columbia Circuit is the most prolific Court of Appeal in the administration, interpretation and review of federal law and constitutional rights for federal agencies. It reviews more decisions by the SEC and Board of the NYSE than any other Circuit Court of Appeal outside of the Third Circuit Court of Appeals (which the present opinion conflicts with as noted below). Allowing the NYSE, to perpetuate its culture as a private club, outside of federal statutory limitations and SEC regulation ultimately affects the security and "general welfare" of all of the United States. See, Silver, 373 U.S. 349-350; H.R. Rep. No. 1383, 73rd Cong. 2d Sess. 15 (1934). In 1962 the importance of the exchanges derived from the fact that they had 47.4 billion dollars in transactions in 1962. 373 U.S. at 350. In 2008 the importance of proper administration and discipline in the exchanges has become even more apparent in the present world-wide financial collapse and the money at stake has infinitely multiplied in that they can do more than 9 billion dollars in transactions each day. In Silver this Court explained the importance of the exchanges and review of their disciplinary actions as an element of the Nation's economic and financial welfare, which is even more relevant in 2008:

> The exchanges are by their nature bodies with a limited number of members, each of which plays a certain role in the carrying out of an exchange's activities. The limited-entry feature of exchanges led historically to their being treated by the courts as

> private clubs. . .and to their being given great latitude by the courts in disciplining errant members . . . As exchanges became a more and more important element in our Nation's economic and financial system, however, the private-club analogy became increasingly inapposite and the ungoverned self-regulation became more and more obviously inadequate, with acceleratingly (sic) grave consequences. This impotency led to the enactment of the 1934 Act. 373 U.S. at 350-351. [Citations omitted].

In 2008, with so much more money and greed, the failure of the NYSE to fairly discipline its members and to follow federal law and "fundamental due process," required by Congress in Section 19(d), is even more important. The private club culture of the NYSE and failure of the SEC and the Circuit Court of Appeals to intervene, allowed the NYSE to ignore Section 19(d) and Congressional intent with impunity. The failure to self-regulate and follow federal law in 2008 has allowed the proliferation of "mortgage backed securities," far in excess of their actually value, which has precipitated the greatest financial debacle in the history of this Nation. The "private club" culture of 1934 is still alive and well in 2008 and still does not work. It is like leaving the wolves in charge of the hen house. The same private club culture has led again to the 2008 financial crash and caused the same financial debacle in 1929. Id.

The failure of the NYSE to follow federal law for Notices of Discipline affects the fundamental due process rights of thousands of brokers and financial advisors and thousands of clients, who rely upon them. Self-regulation by the exchanges with so much money and so

much greed does not work. The importance of this failure to fundamental rights, financial security and general welfare cannot therefore be overstated. This Court has jurisdiction upon the grounds of the importance of this cause to the Nation's financial security, NYSE's disregard for constitutional and federal statutory rights and the thousands of persons the failure to follow those rights affects. See, Stern & Gressman, "Supreme Court Practice," (BNA 4th Ed. 1969), 4.11-4.13.

B. Failure to Allow Statutory and Constitutional Rights Required by Congress for Self-Regulated Organizations.

The failure of NYSE as a self-regulatory organization to follow Congressional intent to protect, "fundamental constitutional rights," required by Section 19(d), Title 15, Section 78s(d)(2), is **shockingly wrong**. Section 19(d) plainly requires that before any period to seek review commences, an aggrieved person must have thirty days to seek review and must have received the Notice of Discipline. A5. In enacting Section 19(d) in 1975 in response to years of complaints and especially concerned that the exchanges as self-regulating organizations would be exercising governmental powers, Congress clearly expressed its view that the provisions of Section 19(d) were crafted to provide the minimal of "fundamental due process," to wit:

> Recognizing that the self-regulatory organizations utilize governmental-type powers in carrying out their responbilities under the Exchange Act highlights the fact that these organizations must be required to conform their activities to fundamental standards of due process. Legislative History of Securities Acts Amend. 179, at 203, P.L. 94-29.

The importance of the right to due process which Congress sought to preserve in Section 19(d) cannot be understated. That the right to due process is fundamental to our system of justice and the Bill of Rights cannot be gainsaid. E.g., Baldwin v. Hale, 68 U.S. (1 Wall.) 223, at 233, 17 L.Ed. 531 (1864); Hagar v. Reclamation District, 111 U.S. 701, 708 (1884). The right to work, like the license of the undersigned in the case at bar, once conferred is a vested property right, which, may not be taken without a showing of lawful cause; and a meaningful opportunity to a fair hearing. In the absence of these elements, the taking of the right is a denial of fundamental due process. See, Friendly, "*Some Kind of Hearing*," U.Pa.L.Rev. 1267, 1281 (1975).

Although, this Court is certainly not here just to correct errors, the failure to follow such a clear expression of Congressional intent and the plain requirement of the federal statute by the NYSE, is "shockingly wrong," within the meaning and intent of those cases where this Court has accepted jurisdiction and acted to correct such flagrant error. Cf., Stern & Gressman, Sections 4.13-4.16. NYSE's disregard for the requirements of the enabling statute allowing it to act as a self-regulating organization, and its trampling of statutory and constitutional rights herein, is within the category of shockingly wrong cases, which this Court has accepted for review. This Court therefore has jurisdiction on this ground as well.

C. Misapplication of Supreme Court decisions.

The Circuit Court of Appeals misapplied this Court's decisions that courts should normally defer to an agency's interpretation of agency rules. A1-A2. In Gates & Fox v. Occupational Safety and Health Review Commission, 790 F.2d 154, at 156 (D.C. Cir. 1986) Circuit Judge Scalia, explained the rule and the error by the District of Columbia Circuit, herein:

> Courts must give deference to an agency's interpretation of its own regulations. *See, e.g., Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980); *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Where the imposition of penal sanctions is at issue, however, the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires. [Emphasis added].

In the present cause, the Circuit Court of Appeals deferred to an Agency which prevented review of its penal sanctions by failing to provide fundamental due process prescribed by Congress in the federal law which allowed the Agency to act as a self-regulating organization and to discipline its members. As Justice Scalia explained in Gates & Fox no such deference should have been allowed to let slide the illegality of NYSE's patent denial of what Congress intended as fundamental due process and requirements for Notice of Discipline in the statute allowing the NYSE to act as a self-regulating organization.

Finally it was undisputed that Enforcement filed its ex parte response, without authority under SEC Rule 470(b) and knowingly failed to cause its ex parte response to be served upon Fox. This fundamental ethical defect was ignored by the Circuit Court of Appeals. The failure to address the issue conflicts with a host of decisions of this Court which prohibit ex parte, unauthorized communication whether it is used to deny relief or not. E.g., Liljeberg v. Health Services Corp., 486 U.S. 847, 860, 865 (1988)(the rules insure not only the fairness of a proceeding, but that it is not secret nor ex parte); Offut v. United States, 348 U.S. 11, 14, (1954); Aetna Life Insurance v. Lavoie, 475 U.S. 813, at 825 (1986); In Re Murchison, 349 U.S. 133, at 136 (1955). Thus, inherent in the requirements for the fundamental fairness of a proceeding is that it is not regarded as secret, biased or ex parte, and that, "our system of justice must satisfy the appearance of justice." [emphasis added], Offut v. United States, 348 U.S. at 14; see, also, Aetna Life Insurance v. Lavoie, 475 U.S. at 825; In Re Murchison, 349 at 136. In this cause, there is a chronic appearance of injustice and impropriety, and a lack of fundamental due process. This Court therefore has jurisdiction over the Circuit Court of Appeals upon the issue of federal court administration.

D. Conflict with other Circuits and State Courts.

In addition to the failure to properly apply this Court's decisions regarding deferral to an agency's interpretation of its rules, the Circuit Court of Appeal conflicts with the Third Circuit Court of Appeals with regard to the standard for review of exchange conduct. In Todd and Company v. Securities Exchange

Commission, 557 F.2d 1008,at 1014 (3d Cir. 1977), the Court correctly applied Congressional intent in enacting Section 19(d) and reversed the SEC regarding its failure to responsibly review the activities of self-regulating organizations:

> Charged with making independent decisions and its own interpretation of the N.A.S.D.'s rules, the Commission must insure fair treatment of those disciplined by the Association. The independent review function entrusted to the S.E.C. is a significant factor in meeting serious constitutional challenges to this self-regulatory mechanism. Since it is a departure from the traditional governmental exercise of enforcement power in the first instance, confidence in the Association's procedures must be maintained. The S.E.C., therefore, should not cavalierly dismiss procedural errors affecting the rights of those subjected to sanctions but should insist upon meticulous compliance by the private organization.

No clearer statement of the judicial conflict with regard to proper review of self-regulating organizations under Section 19(d) could be made, than the Third Circuit expression in Todd, as compared with the inadequate review of flagrant federal statutory and constitutional error and ethical misconduct by the NYSE, overlooked by, "deferring to agency interpretation of its own rules" case law, by the Circuit Court of Appeals herein. Todd complies with the express intent of Congress in enacting Section 19(d) to protect fundamental due process----the present decisions of the SEC and District of Columbia Circuit Court of Appeals do not.

Furthermore, the Circuit Court of Appeals in allowing the inked date from a private postal meter as proof of mailing conflicts directly with the U.S. Fifth Circuit Court of Appeals, which concluded that private postal meters are not "service" nor evidence of "receipt" in federal proceedings. See, Rotenberry v. Commissioner of Internal Revenue, 847 F.2d 229 (5th Cir. 1988)(in the U.S. Tax Court, mail postmarked by the U.S. Postal Service is the only method of "filing," with the only narrow exception that the Secretary of the Treasury may prescribe regulations otherwise).

The Rotenberry decision is the better rule, where U.S. Postal regulations clearly establish that a private postal meter mark is not evidence of mailing, but rather is only evidence that postage has been paid. As specifically provided in the U.S.P.S. Domestic Mailing Manual (DMM), private postal meters are otherwise only evidence that postage has been prepaid. Rule 604.4.1.1 DMM. In the present cause, Enforcement chose to use the United States Postal Service certified mail as the method of "service" by mail. There is no statutory exception allowing service by private postal meter as proof of certified mailing. Compare, Rotenberry v. Commissioner. Under DMM 503.3.3.5d there was no evidence of "when the article was accepted," in that all of the certified mailing documents were blank. Therefore there was no lawful evidence of when Enforcement's third panel opinion was mailed by certified mail. The only proof of mailing offered by Enforcement was, "we-musta-done-that-because-that's-what-we-done-before," provided in Enforcement's unauthorized, ex parte Response at the SEC (A77). Enforcement's proof of service by certified mailing was utterly without lawful basis.

Furthermore, important state court decisions, which have considered the issue, similarly concluded contrary to the present decision that private postal meters are not evidence of receipt or service. E.g., Lin v. Unemployment Compensation Board, 558 Pa. 94, 735 A.2d 697 (1999)(an appeal with a private meter postage mark is only filed when received; date on private postage meter can be manipulated to any date and is inherently unreliable); Upper Allegheny Authority v. Commonwealth, 130 Pa.Cmwlth. 106, 567 A.2d 342 (1989)(private postal meter date is obviously not equivalent to a "postmark"), Penn Valley Management v. Robertson, 724 S.W.2d 661 (Mo.App. 1987)(private postal meter mark is not equivalent of postmark endorsed by the U SPS).

E. Other Reasons to Accept Jurisdiction.

Finally, this Court should also accept this case, because the flagrant error herein recurs and yet evades review. Because of the very severity of the penalty imposed, the financial burden and stigma of the loss of a license affects the very core of what any litigant is able to pursue. Few if any financial advisors have either the funds or the skills of Fox to reach this Court. With no intervention by the SEC or Court of Appeal this cause recurs and yet evades adequate review.

This Court should also accept this case, because there is no other Court available to remedy the chronic denial of fundamental constitutional and statutory rights by the NYSE. The Circuit Court of Appeals and the SEC defer to the NYSE and have failed to act even where there is "shocking" constitutional and statutory error.

CONCLUSION

Relative to this Petition, Fox has been unemployed since February 7, 2000 except for one part-time temporary job for one year in 2007. This Court has long recognized the severity of capriciously depriving a person of the means of livelihood as in the case at bar. Cleveland v. Loudermill, 470 U.S. 532, at 543 (1985); Fusari v. Steinberg, 419 U.S. 379, 389 (1975); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance, 395 U.S. 337, 340 (1969). Although Fox prevailed upon the merits in 2003, he has sacrificed his career, his family and his health to defeat Enforcement's reckless charges and disregard for the truth. Fox has been able to get this far, because he is not a stranger to review upon the merits by this Court. E.g., Strickland v. Washington, 466 U.S. 668 (1985)(reversing the U.S. 11th Circuit sitting en banc; establishing the standard for review of ineffective assistance of counsel); Florida v. Royer, 460 U.S. 491 (1983)(reversing the Florida Third District sitting in the first en banc case in Florida; establishing the standard for drug courier profiles); Chandler v. Florida, 449 U.S. 491, 103 S.Ct. 1319 (1983)(overturning fifty (50) years of precedent and establishing the right of the people to view trials through cameras in the courtroom).

Expecting Fox's multimillion dollar claim for reinstatement retroactively to February 7, 2000, Enforcement's third panel has now fabricated evidence and falsified the record to yet again evade review. Self-regulation with little effective oversight by the SEC or consideration by the Circuit Court of Appeal

allows the disregard of federal law, Congressional intent and fundamental rights. The importance of this cause, is that without fear of regulation or the SEC, the same private club culture has resulted in the world wide financial debacle of 2008. This cause gives the Court a predicate to review and approve the appropriate judicial review in Todd and a substantive structure for the certain onslaught of cases, which will emerge from the present 2008 financial disaster in the exchanges.

The express purpose of the framers of the Constitution in establishing this Court was, "to secure the national rights [and] uniformity of Judgmts." Letter from Chief Justice Hughes, March 23, 1937, quoting John Rutledge of South Carolina, reprinted in 81 Cong. Record 2814-2815 (1937). That supreme purpose of this Court would be well served by the exercise of jurisdiction herein.

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the Petitioner, CALVIN DAVID FOX, prays that this Petition for Certiorari jurisdiction be granted.

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